Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-953

BUFFALO RIVER CONSERVATION & RECREATION COUNCIL, ET AL ..... *Petitioners*

v.

NATIONAL PARK SERVICE, ET AL ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE EIGHTH CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Eighth Circuit Court of Appeals rendered in these proceedings on August 3, 1977.

OPINION BELOW

The Eighth Circuit Court of Appeals' opinion and judgment is reported in 558 F.2d 1342 (1977). A copy of that opinion is attached to this Petition as Appendix "A".

JURISDICTION

This Court has jurisdiction under the provisions of 28 U.S.C. Sections 1254(1) and 2101(c). The Eighth Circuit Court of Appeals rendered its decision in this case on August 3, 1977 and the petitioners filed a timely petition for rehearing which was denied on September 14, 1977. A copy of the Order denying the Petition for Rehearing is attached to this Petition as Appendix "B". This Petition for a Writ of Certiorari is filed within the ninety (90) day period as provided by law.

QUESTIONS PRESENTED

This Petition raises the issue of whether Congress, under the enumerated powers contained in Article I, Section 8 of the United States Constitution or under any other Constitutional provision, has the power to enact legislation establishing a National River. If so, under which of the powers may Congress take such action and what are the specific limits and guidelines for the exercise of the power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A copy of Article I, Section 8 of the United States Constitution is attached to this Petition as Appendix "C".

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . .; nor shall private property be taken for public use, without just compensation.

Public Law 92-237 [16 U.S.C. Section 460m-8] is attached to this Petition as Appendix "D".

STATEMENT OF THE CASE

On March 1, 1972 Congress enacted Public Law 92-237 establishing the Buffalo National River for the stated purposes of "conserving and interpreting an area containing unique scenic and scientific features, and preserving as a free-flowing stream an important segment of the Buffalo River in Arkansas for the benefit and enjoyment of present and future generations." The Act authorized the Secretary of the Interior to acquire by donation, purchase or exchange lands and waters not exceeding ninety-five thousand seven hundred and thirty acres. Of the lands to be acquired 2,960 were to be acquired from the State of Arkansas by donation, 950 acres of federally owned lands were to be transferred to the National Park Service and the remaining acreage was to be acquired from private landowners along the river. To date, the National Park Service has acquired an estimated 60% of the 95,730 acres needed and the remaining 40% is still in private ownership. The Buffalo National River is the first National River established by Congress. Additionally, it is undisputed that the Buffalo River is non-navigable.

The petitioners, private landowners along the river, filed suit in the United States District Court for the Western District of Arkansas (Harrison Division) challenging the power of Congress to enact such legislation. The basis for jurisdiction asserted was 5 U.S.C. Section 702 (review of agency action), 28 U.S.C. Section 1331(a) (federal question), 1361 (mandamus) and 2201 and 2202 (declaratory judgment). The petitioners' request for a three member Court was denied by the District Court on the theory that there was no substantial constitutional issue raised in light of the holding in *United States v. Gettysburg Electric*

Railway, 160 U.S. 668 (1896). The Eighth Circuit Court of Appeals affirmed the lower court's decision on this point.

REASONS FOR GRANTING THE WRIT

The Writ should be granted for several reasons. First, both the District Court and the Eighth Circuit Court of Appeals clearly misinterpreted the holding of *United States v. Gettysburg Railway.*

In the *Gettysburg* case, Congress had passed legislation providing for the establishment of a park to commemorate the battle of Gettysburg with the placement of appropriate markers and monuments. The landowners resisted the condemnation of their lands alleging that this was not a public use and that Congress did not have the power under the enumerated powers of Article I, Section 8 of the United States Constitution to enact such legislation. Mr. Justice Peckham held that this was a public use, thereby satisfying the requirement of the Fifth Amendment to the Constitution. He then turned to the second issue — Congressional authority to establish a park — and at page 681 wrote:

> ". . . Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizens for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. 4 Wheat, 421, in these words: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional.' "

In the instant case, the trial court and the Eighth Circuit Court of Appeals agreed:

> "For at least eighty years the power of the United States to create parklands has been a recognized and popular function of the national government. *U. S. v. Gettysburg Electric Ry.,* 160 U.S. 668 (1896). The Court can find no special circumstances in the present case which would invite re-examination of this power . . ."

Clearly the establishment of the Buffalo National River was not effected under the war making powers of Article I, Section 8 of the United States Constitution. Yet, any power Congress possesses must be found somewhere among one or more of the enumerated powers. The Fifth Amendment is not an additional grant of power to Congress. *United States v. Carmack,* 329 U.S. 230, 241-242 (1946). The *Gettysburg* case, therefore, does not hold that the establishment of a park or national river under all circumstances is constitutional.

Secondly, the Writ should be granted because of the general application of any decision rendered. In the early beginnings of the national park system Congress established parks such as Yellowstone National Park (1872), Sequoia National Park (1890) and Yosemite National Park (1905)

out of public lands without the need of acquiring additional lands from private landowners. However, in recent years the trend has been reversed. In 1968 Congress passed the Redwood National Park Bill under which title to thousands of acres of privately held lands was immediately vested in the United States. A close review of Title 16 of the United States Code pertaining to parks and recreational areas bears out the fact that Congressional creation of new parks and recreational areas has moved forward at an increased pace. This trend removes substantial acreage from private ownership with the resultant losses to the economy. It additionally marks an unwarranted encroachment on the right of private property. At some point in time there should be a balancing of the public interest against the right of the individual to own property without undue interference from the government. In the instant case the National Park Service anticipates taking 95,730 acres of land to preserve a non-navigable river.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals in this case.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari on the attorneys for the Respondents: Mr. Michael A. McCord, Attorney, Appellate Section, United States Department of Justice, Washington, D. C. 20530; Mr. Robert Johnson, United States Attorney, P.O. Box 1524, Fort Smith, Arkansas 72901; and The Solicitor General, Department of Justice, Washington, D. C. 20530 by depositing a copy thereof to each in the United States Mail with the proper postage affixed on this 12th day of December, 1977.

/s/ RANDELL TEMPLETON
Attorney for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2029

Buffalo River Conservation & Recreational Council, et al, *Appellants* v. National Park Service, et al, *Appellees*	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: May 20, 1977

Filed: August 3, 1977

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY and WEBSTER, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

This is a timely appeal by plaintiffs from a memorandum opinion (unpublished) and a final order filed on October 26, 1976, dismissing plaintiffs' complaint filed against the National Park Service and park officials.

Congress by Public Law 97-237, 86 Stat. 44, approved March 1, 1972, provided for the establishment of Buffalo National River (hereinafter called the Park) composed of 95,730 acres along the Buffalo River in Arkansas. The Park, through donations by the State of Arkansas and the purchase from willing sellers acquired approximately 60% of

the acreage and then ran short of appropriations. Further appropriations are anticipated. Acquired and nonacquired land form a checkerboard pattern. Plaintiff Buffalo River Conservation & Recreation Council and its members are owners of nonacquired land. After an Environmental Impact Statement was prepared and approved, the acquired portion of the Park was opened for public use. The Park at its headquarters posted a map showing land acquired. It also posted no trespassing signs on some land within the proposed boundaries of the Park which had not been acquired. The Park has exercised no possessory rights over the nonacquired property and has not encouraged the use of nonacquired property by the public. Public users trespassed upon the land of private owners, cut fences, left gates open, left debris and annoyed owners by requests to use their phones and bathroom facilities.

Plaintiffs asserted eight separate causes of action. All were dismissed except Count IV with respect to which the court found the public had acquired a prescriptive right to float down the river and the owners of nonacquired property could fence off their shore lines, but could not obstruct the river. The court also determined that if and when plaintiffs' property is taken or purchased by the United States, plaintiffs are entitled to compensation for their portion of the stream bed encumbered by the easement. Three errors are asserted as a basis for reversal, to wit:

1. Failure to empanel a three-judge court, pursuant to 28 U.S.C. §2282, for the reason that the constitutionality of Public Law 92-237 presents a substantial federal constitutional issue.

2. Failure to hold Public Law 92-237 unconstitutional as presently applied.

3. Error in holding a prescriptive easement established over the Buffalo River.

A careful examination of the record and applicable law satisfies us that the trial court's findings are supported by substantial evidence and that the decision is not based upon an erroneous view of the law. The affirmance could well be rested upon the trial court's well-reasoned unpublished opinion. However, we shall briefly discuss the errors raised upon appeal.

The first and second asserted errors are closely related. The basic issue on each contention is whether a substantial federal constitutional issue is presented. If so, it would be error to deny a three-judge court under 28 U.S.C. §§2282 and 2284.[1] A three-judge court can properly be denied if no substantial federal question is raised. "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co. v. Redding*, 304 U.S. 252, 255 (1938).

The trial court determined:

> For at least eighty years the power of the United States to create parklands has been a recognized and popular function of the national government. *U. S. v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896). The Court can find no special circumstances in the present case which would invite re-examination of this power. The Court will therefore decline to request the empanelment of a three-judge court and will dismiss the constitutional allegations contained in cause of action number one.

[1]Section 2282 has been repealed by Public Law 94-381, approved August 12, 1976. We note, however, that Public Law 94-381 expressly provides that it does not apply to actions commenced prior to its enactment.

We agree with the trial court.

Plaintiffs have not prayed for damages for an alleged unlawful taking and there is no substantial evidence to support unlawful taking, nor did the trial court make any finding that there has been an unlawful taking. Even if the Government could be considered as having taken plaintiffs' land, plaintiffs are not entitled to injunctive relief. Their remedy is limited to seeking just compensation under the Tucker Act, 28 U.S.C. §§1346(a)(2) and 1491. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

On the prescriptive easement issue relating to public use of the Buffalo River and its bed, the trial court found:

> The testimony has been abundant and the Court has found that canoeists have floated the Buffalo River for many years. This flotation has been open and ever increasing in intensity. Testimony at the trial indicated that on one recent day as many as 1,200 canoes passed the ranger station at the town of Pruitt. The Court is of the opinion that the usage of the River has been open and adverse for much more than the seven years required by Arkansas law for the establishment of a prescriptive public easement over the course of the stream and its bed, and in the same way a public highway can be obtained by prescription, a public right-of-way has been established in the river. *Clinton Chamber of Commerce v. Jacobs*, 212 Ark. 776 (1948); *Howard v. State*, 47 Ark. 431; *Patton v. State*, 50 Ark. 53; *McClain v. Keel*, 135 Ark. 496.

There is substantial evidence to support the trial court's finding that the usage of the river and its bed has been

open and adverse for more than seven years. Under Arkansas law a prescriptive right has been obtained by the public to travel over the non-navigable stream and its bed. *See Weigel v. Cooper,* 245 Ark. 912, 436 S.W.2d 85 (1969); *Fullenwider v. Kitchens,* 223 Ark. 442, 266 S.W.2d 281 (1954).

While the cases cited deal with prescriptive rights-of-way over land, we agree with the trial court that they apply by analogy to rights-of-way over non-navigable streams and their beds.

The judgment appealed from is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76-2029

Buffalo River Conservation & Recreation Council, etc. *Appellant* v. National Park Service, et al, *Appellees*	Appeal from the United States District Court for the Western District of Arkansas.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

September 14, 1977

APPENDIX "C"

§8. [*Powers of congress.*]—[1.] The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post-offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the Supreme Court;

[10.] To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

[11.] To declare war, grant letters of marque and

reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

APPENDIX "D"

92nd Congress, S. 7
March 1, 1972

AN ACT

86 *STAT.* 44

To provide for the establishment of the Buffalo National River in the State of Arkansas, and for other purposes.

Buffalo National River, Ark. Establishment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purposes of conserving and interpreting an area containing unique scenic and scientific features, and preserving as a free-flowing stream an important segment of the Buffalo River in Arkansas for the benefit and enjoyment of present and future generations, the Secretary of the Interior (hereinafter referred to as the "Secretary") may establish and administer the Buffalo National River. The boundaries of the national river shall be as generally depicted on the drawing entitled "Proposed Buffalo National River" numbered NR-BUF-7103 and dated December 1967, which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior. The Secretary is authorized to make minor revisions of the boundaries of the national river when necessary, after advising the Committees on Interior and Insular Affairs of the United States House of Representatives and the United States Senate in writing, but the total acreage within such boundaries shall not exceed ninety-five thousand seven hundred and thirty acres.

Lands and Waters, Acquisition.

SEC. 2. (a) Within the boundaries of the Buffalo National River, the Secretary may acquire lands and waters or interests therein by donation, purchase or exchange, except that lands owned by the State of Arkansas or a political subdivision thereof may be acquired only by donation: *Provided.* That the Secretary may, with funds appropriated for development of the area, reimburse such State for its share of the cost of facilities developed on State park lands if such facilities were developed in a manner approved by the Secretary and if the development of such facilities commenced subsequent to the enactment of this Act: *Provided further,* That such reimbursement shall not exceed a total of $375,000. When an individual tract of land is only partly within the boundaries of the national river, the Secretary may acquire all of the tract by any of the above methods in order to avoid the payment of severance costs. Land so acquired outside of the boundaries of the national river may be exchanged by the Secretary for non-Federal lands within the national river boundaries, and any portion of the land not utilized for such exchanges may be disposed of in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377; 40 U.S.C. 471 et seq.), as amended. With the concurrence of the agency having custody thereof, any Federal property within the boundaries of the national river may be transferred without consideration to the administrative jurisdiction of the Secretary for administration as part of the national river.

Retention Rights.

(b) Except for property which the Secretary determines to be necessary for the purposes of administration,

development, access or public use, an owner or owners (hereafter referred to as "owner") of any improved property which is used solely for noncommercial residential purposes on the date of its acquisition by the Secretary or any owner of lands used solely for agricultural purposes (including, but not limited to, grazing) may retain, as a condition of the acquisition of such property or lands, a right of use and occupancy of such property for such residential or agricultural purposes. The term of the right retained shall expire upon the death of the owner or the death of his spouse, whichever occurs later, or in lieu thereof, after a definite term which shall not exceed twenty-five years after the date of acquisition. The owner shall elect, at the time of conveyance, the term of the right reserved. The Secretary shall pay the owner the fair market value of the property on the date of such acquisition, less the fair market value of the term retained by the owner. Such right may, during its existence, be conveyed or transferred, but all rights of use and occupancy shall be subject to such terms and conditions as the Secretary deems appropriate to assure the use of such property in accordance with the purposes of this Act. Upon a determination that the property, or any portion thereof, has ceased to be used in accordance with such terms and conditions, the Secretary may terminate the right of use and occupancy by tendering to the holder of such right an amount equal to the fair market value, as of the date of the tender, of that portion of the right which remains unexpired on the date of termination.

"Improved Property."

(c) As used in this section the term "improved property" means a detached year-round one-family dwelling which serves as the owner's permanent place of abode at

the time of acquisition, and construction of which was begun before September 3, 1969, together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use.

Hunting and Fishing, Rules and Regulations.

SEC. 3. The Secretary shall permit hunting and fishing on lands and waters under his jurisdiction within the boundaries of the Buffalo National River in accordance with applicable Federal and State laws, except that he may designate zones where and establish periods when, no hunting or fishing shall be permitted for reasons of public safety, administration, fish or wildlife management, or public use and enjoyment. Except in emergencies, any rules and regulations of the Secretary pursuant to this section shall be put into effect only after consultation with the Arkansas Fish and Game Commission.

Water Resource Projects, Restriction.

SEC. 4. The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (41 Stat. 1063), as amended (16 U.S.C. 791a et seq.), on or directly affecting the Buffalo National River and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river is established, as determined by the Secretary. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below

or above the Buffalo National River or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of approval of this Act. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river is established, as determined by the Secretary, nor shall such department or agency request appropriations to begin construction on any such project, whether heretofore or hereafter authorized, without, at least sixty days in advance, (i) advising the Secretary, in writing, of its intention so to do and (ii) reporting to the Committees on Interior and Insular Affairs of the United States House of Representatives and the United States Senate, respectively, the nature of the project involved and the manner in which such project would conflict with the purposes of this Act or would affect the national river and the values to be protected by it under this Act.

Administration.

SEC. 5. The Secretary shall administer, protect, and develop the Buffalo National River in accordance with the provisions of the Act of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1 et seq.), as amended and supplemented; except that any other statutory authority available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of this Act.

Area Review; Report To President.

SEC. 6. Within three years from the date of enactment of this Act, the Secretary shall review the area within the boundaries of the national river and shall report to the

President, in accordance with subsections 3(c) and 3(d) of the Wilderness Act (78 Stat. 890; 16 U.S.C. 1132 (c) and (d)), his recommendation as to the suitability or nonsuitability of any area within the national river for preservation as a wilderness, and any designation of any such area as a wilderness, shall be accomplished in accordance with said subsections of the Wilderness Act.

Appropriation.

SEC. 7. For the acquisition of lands and interests in lands, there are authorized to be appropriated not more than $16,115,000. For development of the national river, there are authorized to be appropriated not more than $283,000 in fiscal year 1974; $2,923,000 in fiscal year 1975; $3,643,000 in fiscal year 1976; $1,262,000 in fiscal year 1977; and $1,260,000 in fiscal year 1978. The sums appropriated each year shall remain available until expended.

Approved March 1, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-807 accompanying H. R. 8382 (Comm. on Interior and Insular Affairs).

SENATE REPORT: No. 92-130 (Comm. on Interior and Insular Affairs).

CONGRESSIONAL RECORD:

Vol. 117 (1971): May 21, considered and passed Senate.

Vol. 118 (1972): Feb. 7, considered and passed House, amended, in lieu of H. R. 8382.

Feb. 9, Senate concurred in House amendment.